Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1482

NUNO J. DoCARMO, ADMINISTRATOR OF THE ESTATE OF NUNO J. DoCARMO, JR.,
PETITIONER,

v.

PILGRIM I. CORP.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Statement of the Facts	3
Reasons for Allowance of the Writ	4
Conclusion	12
Appendix A	13
Appendix B	15
Appendix C	22
Appendix D	23

Table of Authorities Cited

Cases

Aguilar v. *Standard Oil Co. of New Jersey*, 318 U.S. 724, 63 S.Ct. 930 (1943)	7
Arizona v. *Anelich*, 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075 (1936)	5
Cortes v. *Baltimore Insular Line*, 287 U.S. 367, 53 S.Ct. 173 (1932)	5
Cosmopolitan Shipping Co. v. *McAllister*, 337 U.S. 783, 69 S.Ct. 1317 (1949)	5, 7
Cox, et al. v. *Roth*, 348 U.S. 207, 75 S.Ct. 242 (1955)	4, 5
Fitzgerald v. *United States Lines Co.*, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed. 2d 720 (1963)	12
Garrett v. *Moore-McCormack Co., Inc., et al.*, 317 U.S. 239, 63 S.Ct. 246 (1942)	6, 7
International Stevedoring Co. v. *Haverty*, 272 U.S. 50, 47 S.Ct. 19 (1926)	5

Page

Jamison v. *Encarnacion*, 281 U.S. 635, 50 S.Ct. 440, 74 L.Ed. 1082 (1930) 5, 7
Michigan Central Railroad Company v. *Vreeland*, 227 U.S. 59, 33 S.Ct. 192 (1913) 9
Mobil Oil Corporation v. *Higginbotham, et al.*, 98 S.Ct. 2010 (1978) 9, 10
Moragne v. *States Marine Lines, Inc., et al.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970) 8, 11, 12
O'Donnell v. *Great Lakes Dredge and Dock Co.*, 318 U.S. 36, 63 S.Ct. 488 (1943) 6
Sea-Land Services, Inc. v. *Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 2d 9 (1974) 8, 9, 11, 12
The Sea Gull, 21 F. Cas. 909 (No. 12,578) (C.L. Md. 1865) 11
Uravic v. *F. Jarka Co.*, 282 U.S. 234, 51 S.Ct. 111, 75 L.Ed. 312 (1931) 5
Warner v. *Goltra*, 293 U.S. 155, 55 S.Ct. 46 (1934) ... 5, 10
Waterman S.S. Corporation v. *Jones*, 318 U.S. 724, 63 S.Ct. 930 (1943) 7

Constitutional Provisions and Statutes

United States Constitution, Article III, § 2 2
Jones Act, 46 U.S.C. § 688 ..... 3, 4, 5
The Death On The High Seas Act, 46 U.S.C. §§ 761 and 762 ..... 2, 4, 5, 9
Federal Employer's Liability Act, 45 U.S.C. § 51 3
Massachusetts General Laws, Ch. 229, § 2 3

In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

NUNO J. DoCARMO, ADMINISTRATOR OF THE ESTATE OF NUNO J. DoCARMO, JR.,
PETITIONER,

v.

PILGRIM I. CORP.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED ON DECEMBER 28, 1979

Opinions Below

The jury verdict, entitled "Questions to Jury" and the Judgment of the District Court for the District of Massachusetts are printed in Appendix A, p. 13 hereof, the said judgment having been entered on January 8, 1979.

The Opinion of the United States Court of Appeals for the First Circuit, entered on December 28, 1979, is printed in Appendix B, p. 15 hereof. The said Opinion has not been printed as yet in the official reports.

Jurisdiction

The Judgment of the United States Court of Appeals for the First Circuit entered on December 28, 1979 is printed in Appendix C, p. 22 hereof. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

I. Whether damages under the Jones Act are limited to pecuniary loss and loss of services, or whether they include, in addition, damages for loss of society, including companionship, love, and affection?

II. Whether the failure to award damages in this action after a finding of liability as to both unseaworthiness and negligence, and with a further finding of no contributory negligence, creates an anomaly in the laws regarding recovery for the death of a seaman?

III. Whether the parents of the decedent seaman must establish their dependency, even partial dependency, upon the decedent in order to recover damages under the Jones Act?

Constitutional Provisions and Statutes Involved

The constitutional provision involved is Article III § 2 of the United States Constitution. Statutes involved are the Jones Act, 46 U.S.C. § 688, The Death on the High Seas Act, 46 U.S.C. §§ 761 and 762, Federal Employer's Liability

Act, 45 U.S.C. § 51, and Massachusetts General Laws, Ch. 229 § 2, printed in Appendix D, pp. 23-26 hereof.

Statement of the Case

This is an action brought by the administrator of the estate of a seaman for the benefit of the estate and for the benefit of the mother, father, and brother of the deceased seaman. The action arises out of the wrongful death of the seaman, which was caused by the negligence of the defendant and the unseaworthiness of the defendant's vessel. The Plaintiff's Third Amended Complaint, which is the controlling Complaint in this case, is in five counts. The first count, which is the only relevant count on Appeal, arises under § 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, U.S.C. Title 46, § 688, commonly called the Jones Act.

The action was tried to a jury in the United States District Court in Boston within the District of Massachusetts. On special questions submitted by the Trial Judge, the jury returned a verdict stating that the decedent had been killed as a result of the negligence of the defendant and as a consquence of the unseaworthiness of the defendant's vessel. The jury also answered that the decedent was not guilty of any contributory negligence. Notwithstanding the above, the jury found that the decedent's father, mother, and brother sustained no damages as a result of their intestate's death, the Court having allowed a motion in limine filed by the defendant excluding non-pecuniary damages such as loss of society from the jury's consideration of damages in this action.

Statement of the Facts

The plaintiff's intestate, Nuno J. DoCarmo, Jr., was a seaman and fisherman and employed as a member of the crew of the F/V PILGRIM I, which at all times material to this action was owned, operated, and controlled by the

defendant. On June 30, 1974, the F/V PILGRIM I was engaged in the business of commercial fishing on navigable waters, more than a marine league from the nearest shore. At the time of the accident resulting in the decedent's death, the vessel was engaged in bringing aboard a portion of its net containing a catch of fish. The uncontroverted testimony was that the decedent was doing his job properly, and he was positioned properly when he was struck on the head by parts of the rigging of the vessel, falling from a height of approximately 30 feet above the deck. Further, the uncontroverted testimony was that the rigging fell as the result of an inadequate part of the vessel's equipment, namely, a shackle. The shackle employed should not have been used where it was being used aboard the vessel. The jury found that the use of this shackle constituted negligence of the defendant vessel owner and unseaworthiness of the vessel. The decedent left behind a mother, father, and brother with whom he was living prior to his last voyage. The decedent was unmarried and was 21 years old at the time of his death, and his surviving brother was 16 years old.

Reasons for Allowance of the Writ

The exercise of a sound judicial discretion mandates that the United States Supreme Court review the issues presented in this petition. The issues presented for review ask this Court to rule, for the first time, on the meaning of the word "damages" under 46 U.S.C. § 688, the Jones Act.

The Jones Act, enacted by Congress about two months after it had enacted the Death On The High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*, was welfare legislation designed to promote and provide for "the welfare of seamen", *Cox et al.* v. *Roth,* 75 S.Ct. 242, 244 (1955), and was passed into law by Congress for "the benefit and protection

of seamen who are peculiarly the wards of admiralty." *The Arizona* v. *Anelich,* 298 U.S. 110, 123, 56 S.Ct. 707, 711, 80 L.Ed. 1075 (1936). Whereas DOHSA covers any person wrongfully killed upon the high seas,[1] the Jones Act specifically applies only to seamen.[2] Although DOHSA, in § 762, explicitly restricts the damages recoverable under that Act to those for "pecuniary loss", the Jones Act contains no such restriction on the meaning of the word "damages" employed in § 688.

Whenever a question of construction has arisen under the Jones Act, the Supreme Court has consistently interpreted its language in a broad and liberal fashion. Illustrative of this firmly established expansive approach is *Cox* v. *Roth,* supra, in which Justice Clark, for a unanimous Court wrote, "The Jones Act 'as welfare legislation' . . . is entitled to a liberal construction to accomplish its beneficent purposes." citing *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783, 790, 69 S.Ct. 1317, 1321. Also illustrative is *Warner* v. *Goltra,* 293 U.S. 155, 55 S.Ct. 46 (1935) in which Justice Cardozo writing for a unanimous Court held, "In the enforcement of the statute (Jones Act) a policy of liberal construction announced at the beginning has been steadily maintained," . . . and " 'Words' we said, 'are flexible' ", citing *International Stevedoring Co.* v. *Haverty,* 272 U.S. 50, 52, 47 S.Ct. 19 . . . "Later decisions of this Court have been conceived in a like spirit (*Jamison* v. *Encarnacion,* 281 U.S. 635, 50 S.Ct. 440, 74 L.Ed. 1082; *Uravic* v. *F. Jarka Co.,* 282 U.S. 234, 51 S.Ct. 111, 75 L.Ed. 312; *Cortes* v. *Baltimore Insular Line,* 53 S.Ct. 173) and other courts have followed suit." *Warner* v. *Goltra,* supra, 55 S.Ct. at page 47.

The Court in *Warner* v. *Goltra* had to determine the meaning of the word "seaman" under the Jones Act and

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[1] 46 U.S.C. § 761
[2] 46 U.S.C. § 688

whether a master of a vessel would fall within that class. Justice Cardozo wrote at page 49 of 55 S.Ct., "It means that 'for the purposes of the chapter 'seaman' shall include persons who otherwise might be deemed not to be seamen.' *It puts into the class some that might otherwise be excluded; it does not take anyone out who would otherwise be there.*" (emphasis added) If the same principle of construction is applied to the term "damages" under the Jones Act, loss of society should be permitted as an element of damages.

Liberal construction of the Jones Act has been followed consistently through the years by the United States Supreme Court in the cases of *Garrett* v. *Moore-McCormack Co., Inc., et al.,* 317 U.S. 239, 63 S.Ct. 246 (1942) and *O'Donnell* v. *Great Lakes Dredge and Dock Co.,* 318 U.S. 36, 63 S.Ct. 488 (1943). In *O'Donnell,* the Court construed the Jones Act phraseology "in the course of his employment" to include injuries sustained on land as well as on navigable waters, and held at page 252 of 63 S.Ct.,

> "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters. On the contrary it seems plain that in taking over the principles of recovery already established for railroad employees and extending them in the new admiralty setting (see *The Arizona* v. *Anelich,* supra) to any seaman injured 'in the course of his employment', *Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given to them the full support of all the constitutional power it possessed. Hence the Act allows the recovery sought unless the Constitution forbids it.*" (emphasis added)

In *Aguilar* v. *Standard Oil Co. of New Jersey* and *Waterman S.S. Corporation* v. *Jones* collectively reported at 318 U.S. 724, 63 S.Ct. 930 (1943), the Court held at 63 S.Ct. 933,

> "*The legislation therefore gives no ground for making inferences adverse to the seaman or restrictive of his rights.* Cf. *Reed* v. *Canfield, C. C.,* 20 Fed. Cas. page 426. No. 11,641, 1 Sumn. 195. *Rather it furnishes the strongest basis for regarding them broadly, when an issue concerning their scope arises, and particularly when it relates to the general character of relief the legislation was intended to secure.*" (Emphasis added)

and at page 936,

> "To exclude such injuries from the scope of the liability would ignore its origins and purposes.
>
> "There is strong ground therefore for regarding the right to maintenance and cure as covering injuries received without misconduct while on shore leave. *Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf.*" (Emphasis added)

The same principle of liberal construction was applied in *Cosmopolitan Shipping Co.* v. *McAllister,* 377 U.S. 783, 69 S.Ct. 1317 (1949).

In *Jamison* v. *Encarnacion,* supra, the Court held at page 442 of 50 S.Ct.,

> ***The (Jones) Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used.''*** citing *Miller* v. *Robertson,* 266 U.S. 243, 248, 250, 45 S.Ct. 73, 69 L.Ed. 265, holding that ***''The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears.''*** 45 S.Ct. at p. 76 (Emphasis added)

In *Garrett* v. *Moore-McCormack Co.,* supra, the Court held at page 252 of 63 S.Ct., that since the Jones Act is ***''an integral part of the maritime law, rights fashioned by it are to be implemented by admiralty rules not inconsistent with the Act.''*** (Emphasis added) This desire for Jones Act uniformity with the common law in admiralty has existed since early times and formed in large measure the basis for the reasoning of the Court in *Moragne* v. *States Marine Lines, Inc., et al.,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970) and *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573, 94 S.Ct. 806 (1974). In *Moragne,* the Court created a common law wrongful death action in admiralty, where none had previously existed, and in *Gaudet,* the Court permitted the recovery of loss of society damages in such an action. Each of these holdings brought the admiralty into uniformity with the law in most of the states, which permit wrongful death actions and permit the recovery of loss of society damages. In Masachusetts, where this action was brought, loss of society damages are recoverable in a wrongful death action.[3]

In deciding whether to grant certiorari in this case, the

[3] See App. D, pp. 23-24.

Court must determine whether or not to extend to the Jones Act its holding in ***Mobil Oil Corporation*** v. ***Higginbotham, et al.,*** 98 S.Ct. 2010 (1978), which by its terms is confined only to a construction of DOHSA. In *Higginbotham,* the Court was confronted with express statutory language in DOHSA confining damages to pecuniary loss.[4] This language is ***not present*** in the Jones Act which permits simply the recovery of ''damages'' in a wrongful death action under the Act.

Petitioner submits that Congress, two months after it had enacted DOHSA, was fully aware that it could have restricted Jones Act damages as well, yet it chose a non-restrictive measure of damages. In order to bring the Jones Act into conformity with the common law in admiralty and with the majority of states,[5] each of which permits the recovery of loss of society damages, the Court should hold that Jones Act damages embrace such a recovery.

Damages under the Jones Act have been construed by the lower federal courts to be limited to pecuniary loss even though the Supreme Court has not ruled directly on the issue. In 1913, the Court in ***Michigan Central Railroad Company*** v. *Vreeland,* 227 U.S. 59, 33 S.Ct. 192 (1913) restricted damages under the Federal Employer's Liability Act (FELA), enacted in 1908, which Act is incorporated in the Jones Act, to pecuniary losses. ***The meaning of damages under the Jones Act has never been considered by the Supreme Court, and the issue of FELA damages has not been reconsidered since 1913.*** Vast changes in the admiralty and in most common law jurisdictions have occurred since that time so that it should now be considered archaic and barbaric to exclude as an element of damages in a Jones Act death action, recovery for loss of society. As

[4] 46 U.S.C. § 762

[5] *See Sea-Land Services, Inc.* v. *Gaudet, supra,* 94 S.Ct. at page 816.

Justice Cardozo declared in *Warner* v. *Goltra,* supra, at page 48 of 55 S.Ct. in ruling on the meaning of the word "seamen" under the Jones Act,

> *"What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained . . . An ancient evil was to be uprooted, and uprooted altogether. It was not to be left with fibers still clinging to the soil."* (Emphasis added)

A careful reading of *Higginbotham,* supra, indicates that the Court would have permitted recovery of loss of society damages under DOHSA if Congress had not expressly limited recovery under that Act to pecuniary loss.[6] Accordingly, where the Jones Act does not restrict recoverable damages to pecuniary loss, the Court should permit such a recovery (1) to create a uniformity with the common law in admiralty and with a clear majority of states, and (2) to be consistent with the rules of construction of Jones Act terminology applied over the years by this Court.

The inequities inherent in ruling out damages for loss of society are glaringly manifest in this action. The decedent was an unmarried twenty-one-year old seaman when he was wrongfully killed at sea while a crewmember on the defendant's vessel. The prospect that he would have contributed to the support of his parents in the future was negligible when compared with the real loss that they and the decedent's brother suffered as a result of his death, namely their loss of his society. Nonpecuniary damages should be recoverable in a Jones Act action, particularly

[6] *See Mobil Oil Corporation* v. *Higginbotham, supra,* at pp. 2013-2015.

where that statute does not have a dependency requirement in order for the decedent's parents to recover damages. A holding otherwise will create the anomalous situation not favored by our system of jurisprudence wherein a proven tortfeasor[7] need not respond in damages to a victim's closest family members.

The *Gaudet* Court in deciding that nonpecuniary damages are recoverable in a general maritime law death action cited one commentator who obesrved "whether such damages are classified as 'pecuniary' or recognized and allowed as nonpecuniary, the recent trend is unmistakably in favor of permitting such recovery." *Sea-Land Services, Inc.* v. *Gaudet,* supra, at page 816. The Court in *Moragne* and *Gaudet* recognized that admiralty "principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Moragne* v. *State Marine Lines, Inc.,* supra at page 1780 of 90 S.Ct., and *Sea-Land Services, Inc.* v. *Gaudet,* supra at page 811 of 94 S.Ct. The Court also recognized in those cases that it would *"be guided by the principle of maritime law that 'certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules'."* *Sea-Land Services, Inc.* v. *Gaudet,* Ibid. at page 814 of 94 S.Ct. citing *The Sea Gull,* 21 F.Cas. 909 (No. 12,578) (C.L. Md. 1865). (Emphasis added) The *Gaudet* Court proclaimed further,

> "We recognize of course that our decision permits recovery of damages not generally available under the Death On The High Seas Act. Traditionally, however, 'Congress has largely left to this Court the responsi-

[7] In this action the defendant was found negligent and its vessel unseaworthy, each of which caused the decedent's death. Further, the decedent was found not guilty of any contributory negligence.

bility for fashioning the controlling rules of admiralty law.' " *Sea-Land Services, Inc.* v. *Gaudet*, footnote 22 at p. 816 citing *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 1650, 10 L.Ed. 2d 720 (1963).

and

"Thus, our decision to permit recovery for loss of society aligns the maritime wrongful-death remedy with a majority of state wrongful death statutes. But in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." 94 S.Ct. at p. 816.

Such a goal of uniformity is all the more important in this action where the Massachusetts wrongful death statute encompasses loss of society damages, and where the Jones Act is to be construed in accordance with the common law in admiralty which permits recovery of loss of society damages in a general maritime law death action. See *Moragne* and *Gaudet*, supra.

Conclusion

For the reasons set forth herein, it is respectfully submitted that this petition for a writ of certiorari should be allowed.

Respectfully submitted,

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APPENDIX A

United States District Court
District of Massachusetts

Civil Action 74-4405-MA
Nuno J. Do Carmo, Administrator of the
Estate of Nuno J. DoCarmo, Jr., Et Al
v.
F. V. Pilgrim I Corp.

QUESTIONS TO JURY

(1) Was the injury and subsequent death of the decedent due to the negligence of the shipowner?
The Jury answers Yes

(2) Was the injury and subsequent death of the decedent due to the unseaworthiness of the vessel or any of its equipment?
The Jury answers Yes

(3) If so, what are the damages to the decedent's:
(a) Father and Mother None
(b) Brother None

(4) What is the amount of damages the jury awards for conscious pain and suffering?
The Jury answers None

(5) Was the decedent contributorily negligent?
The Jury answers No

(6) If your answer to question (5) is yes, state what percentage of the total cause of the accident is attributable to the contributory negligence of the decedent.
The Jury answers 0%

(7) Does the jury award prejudgment interest?
The Jury answers No

(s) Thomas J. Murphy, Jr.
Foreman

December 19, 1978
Filed in court 12/19/78 — *RJS*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 74-4404-MA

NUNO J. DO CARMO, ET AL.
v.
F. V. PILGRIM I CORP.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable A. David Mazzone, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict on special questions, and the Court having allowed the defendant's motion to withdraw the issue of limitation of liability, it is ORDERED and ADJUDGED that the complaint be and hereby is dismissed.

Dated at Boston, Massachusetts, this 8th day of January, 1979.

By the Court,
(s) ROBERT J. SMITH, JR.
Deputy Clerk

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 79-1115

NUNO J. DoCARMO, ETC.,
PLAINTIFF, APPELLANT,
v.
F. V. PILGRIM I CORP.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
and WYZANSKI,* *Senior District Judge.*

Ronald B. Horvitz, with whom *Morris D. Katz*, and *Katz and Horvitz* were on brief, for appellant.
Thomas E. Clinton, with whom *Astrid C. Glynn*, and *Glynn & Dempsey* were on brief, for appellee.

December 28, 1979

CAMPBELL, *Circuit Judge*. Nuno J. DoCarmo, Jr., a seaman and member of the crew of the F/V PILGRIM I, was injured in the course of his employment on that vessel. The accident occurred on the high seas, more than a marine league from the nearest shore. DoCarmo was transported by Coast Guard helicopter to Cape Cod Hospital in Hyannis, Massachusetts, where he was pronounced dead on arrival.

* Of the District of Massachusetts, sitting by designation.

Appellant brought this action as administrator of the deceased's estate for the benefit both of the estate and the deceased's father, mother, and brother. The five count complaint was framed in terms of the Jones Act, 46 U.S.C. § 688; the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*, and general admiralty and maritime law. Appellant has focused his appeal on questions arising under the Jones Act count. Both negligence and unseaworthiness were alleged as causes of the injury and subsequent death of DoCarmo, and the jury, in answer to special interrogatories found liability based on both those theories. Responding, however, to further interrogatories, the jury determined that no recoverable damages had been sustained. In requesting that this court remand the case for a further hearing on the issue of damages, appellant emphasizes in particular the contention, rejected by the district court, that damages for loss of society, including companionship, love and affection, are properly recoverable under the Jones Act in an action brought by the survivors of a seaman wrongfully killed on the high seas.[1]

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[1] The Jones Act provides

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

46 U.S.C. § 688.

The defendant- appellee filed at trial a motion in limine which requested that the district court instruct the plaintiff-appellant "not to refer in any way to damages for loss of consortium or non-

The Jones Act, unlike DOHSA,[2] does not specifically limit recoverable damages to those of a pecuniary nature. The Act does, however, incorporate by reference the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, the statute providing compensation for the injury or death of railway workers. Although FELA likewise contains no explicit language limiting an award to pecuniary loss, that statute has from an early time been uniformly interpreted to thus restrict the damages recoverable. *Michigan Central R.R.* v. *Vreeland,* 227 U.S. 59 (1913); *see also* cases cited in *Ivy* v. *Security Barge Lines, Inc.,* No. 76-4130, slip op. at 1058-59 n. 4 (5th Cir. Nov. 13, 1979) (en banc). Drawing on the limited recovery available under FELA and that statute's incorporation into the Jones Act, courts have also consistently confined Jones Act damage awards to pecuniary loss. *E.g., Cleveland Tankers* v. *Tierney,* 169 F.2d 622 (6th Cir. 1948); *Igneri* v. *Cie de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949 (1964); *see also* cases cited in *Ivy, supra,* slip op. at 1059 n.5. Most recently, the Fifth Circuit sitting en banc, thoroughly reviewed the relevant authority in considering whether current developments in maritime law warrant a departure from this established rule. The court concluded that the Jones Act "does not permit the recovery in a wrongful death action of damages for loss of society of a

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pecuniary damages." The court granted the motion expressing its belief that under *Mobil Oil Corp.* v. *Higginbotham,* 436 U.S. 618 (1978), such damages were not recoverable in "a Death-on-the-High-Seas-Act case, despite the fact that the case is also brought under the Jones Act."

[2] The Death-on-the-High-Seas-Act provides, in relevant part:

> "The recovery in such suit shall be a fair and just compensation for *the pecuniary loss* sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative suit is brought."

46 U.S.C. § 762. (Emphasis added.)

seaman." *Ivy* v. *Security Barge Lines, Inc.*, No. 76-4130, slip op. at 1062 (5th Cir. Nov. 13, 1979) (en banc). While we would place less reliance than did that court on the Supreme Court's recent pronouncement in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) (holding that DOHSA's exclusion of non-pecuniary damages precludes the awarding of such damages under general maritime law in a death action arising on the high seas), we entirely agree with the thrust of Judge Rubin's analysis, and hold that in an action for wrongful death on the high seas premised on the Jones Act, the deceased seaman's survivors are limited to recovering damages of a pecuniary nature.[3] We thus find no error in the district court's ruling and jury instructions so limiting damages.

Appellant raises several other issues which may be dealt with rather briefly. Appellant charges that the jury's failure, after finding liability, to award any damages "creates an anomaly." We disagree. The jury was entitled to find on the conflicting evidence before it that DoCarmo's family had suffered no pecuniary loss as a result of the seaman's death—that based on past practices, he likely would have contributed little or nothing to his family in the future.[4]

Appellant argues further that the parents of a deceased seaman need not establish their dependency on the decedent in order to recover damages under the Jones Act.[5] Assuming this to be the law, *see Cleveland Tankers* v. *Tierney*, *supra*, 619 F.2d at 624, the fact remains that the jury was never instructed to the contrary. Had appellant believed the district court's instructions limiting recovery to pecuniary damages somehow implied that a finding of dependency was required (although we are unable to discover any such implication), he should have made the point by way of objection to the charge. Fed. R. Civ. P. 51. He cannot raise the contention for the first time here.

The jury received special interrogatories requesting "yes" or "no" answers to questions concerning negligence, seaworthiness, contributory negligence, damages and prejudgment interest. Sometime after the jury retired to deliberate, it asked the court to clarify a point on the issue of prejudgment interest.[6] The record does not indicate

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[3] We think that arguments concerning any injustice alleged to be perpetrated by this rule should properly be addressed to Congress. The Supreme Court limited FELA damages to pecuniary losses in 1913, *Vreeland*, *supra*. Congress enacted the relevant portion of the Jones Act in 1920. The Merchant Marine Act of 1920, § 33, 41 Stat. 1007. Therefore, Congress must have been conscious that it was adopting this limitation when it explicitly incorporated by reference the FELA compensation scheme.

[4] The jury found that DoCarmo had not suffered damages for conscious pain and suffering. This finding was not unreasonable based on the evidence presented.

[5] The relevant section of FELA, incorporated into the Jones Act, states:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .."

45 U.S.C. § 51.

[6] The special interrogatories were:

> "(1) Was the injury and subsequent death of the decedent due to the negligence of the shipowner?
> (2) Was the injury and subsequent death of the decedent due to the unseaworthiness of the vessel or any of its equipment?
> (3) If so, what are the damages to the decedent's:
> (a) Father and Mother
> (b) Brother
> (4) What is the amount of damages the jury awards for conscious pain and suffering?
> (5) Was the decedent contributorily negligent?
> (6) If your answer to question (5) is yes, state what percentage of the total cause of the accident is attributable to the contributory negligence of the decedent.
> (7) Does the jury award prejudgment interest?

The question posed by the jury was as follows:

> "Your Honor,
> Pertaining to question 7, does it apply to question three (3) and four (4) only, or does it also apply to any money coming from the Jones Act, High Seas Act, or whatever?
> Jurors"

any response, but appellee tells us that after consulting with both counsel, the court did supply some kind of an answer. No question as to that procedure is, in any event, before us. Following receipt of the unfavorable verdict on the issue of damages, appellant moved that the district court grant a new trial, arguing among various reasons, that the "failure to make an award of damages in this action after the jury asked a question concerning the applicability of prejudgment interest to any awards they were to make is a patent demonstration that the jury did not understand its function in this case." This motion for new trial was denied; appellant now again voices his contention of jury confusion in arguing that the district court's denial of the motion was incorrect. While the jury's question may indicate some degree of uncertainty on the part of one or more jurors on the issues of prejudgment interest and the potential sources of a damages award, this does not necessarily indicate any similar uncertainty regarding the ultimate finding that no damages were sustained. That the jury might have been considering an award at the time it posed the question on interest reveals little, and is in any case beyond the scope of a court's inquiry. *See* Fed. R. Evid 606(b). The district court was well within its discretion in refusing to grant a new trial. *See* 6A Moore's Federal Practice ¶ 59.15[3].

Appellant also challenges an evidentiary ruling by the district court. Appellee, during the presentation of his case called Officer Robert D. Hobson who testified as to a statement made by DoCarmo's father concerning his son's whereabouts during 1973. This evidence was received, after a lengthy bench conference, specifically as a prior inconsistent statement in order to impeach the father who, while testifying, had made a statement contrary to that offered by Hobson. At the close of appellee's case, appellant proposed to put in some so-called rebuttal evidence to negate

the impact of Hobson's testimony. This purported rebuttal, however, did not go to the question of the father's consistency as a witness, but rather went to the substantive issue of DoCarmo's whereabouts. Appellant had a chance to offer this evidence during the presentation of his case in chief; we find neither abuse of discretion nor reversible error in the court's unwillingness to permit appellant to reopen his case so as to allow that evidence, disguised as rebuttal testimony, to come in. *See* Fed. R. Evid. 403.

The judgment of the district court is affirmed.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 79-1115.

NUNO J. Do CARMO, ETC.,
PLAINTIFF, APPELLANT,
v.
F. V. PILGRIM I. CORP.,
DEFENDANT, APPELLEE.

JUDGMENT
Entered December 28, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP, *Clerk.*
[cc. Horvitz and Clinton.]

APPENDIX D

UNITED STATES CONSTITUTION, ART. III
(in pertinent part)

Section 2, Clause 1. (Subjects of jurisdiction)

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between citizens of different States;—between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Massachusetts General Laws, Chap. 229, Sec. 2

A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to com-

pensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) punitive damages in an amount of not less than five thousand dollars in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant; except that (1) the liability of an employer to a person in his employment shall not be governed by this section, (2) a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier, and (3) a person operating a street railway or electric railroad shall not be liable for negligence for causing the death of a person while walking or being upon that part of the street railway or electric railroad not within the limits of a highway. A person shall be liable for the negligence or the willful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased. No recovery shall be had under this section for a death which does not occur within two years after the injury which caused the death. An action to recover damages under this section shall be commenced within three years from the date of death or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty.

Death On The High Seas Act, 46 U.S.C., Sec. 761
Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Death On The High Seas Act, 46 U.S.C., Sec. 762
Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Jones Act, 46 U.S.C., Sec. 688
Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death

in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Federal Employer's Liability Act, 45 U.S.C., Sec. 51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees (in pertinent part)

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, applicances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Supreme Court, U. S.
FILED
APR 21 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1482

NUNO J. DoCARMO, ADMINISTRATOR OF THE ESTATE OF NUNO J. DoCARMO, JR.,
PETITIONER,

v.

PILGRIM I CORP.,
RESPONDENT.

BRIEF OF RESPONDENT, PILGRIM I CORP., IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
Counter-Statement of the Question Presented	1
Counter-Statement of the Facts	2
Reason for Denial of the Writ	4
Conclusion	8

TABLE OF CITATIONS

Cases

Ballard v. *Forbes*, 208 F.2d 883 (1st Cir. 1954)	5
Cities Service Oil Company v. *Launey*, 403 F.2d 537 (5th Cir. 1968)	5
Cleveland Tankers v. *Tierney*, 169 F.2d 622 (6th Cir. 1948)	5
Cox v. *Roth*, 348 U.S. 207, 75 S.Ct. 242 (1954)	6
Dixon v. *Serodino, Inc.*, 331 F.2d 668 (6th Cir. 1964)	5
DoCarmo v. *Pilgrim I Corp.*, 612 F.2d 11 (1st Cir. 1980)	7
Dow v. *Carnegie-Illinois Steel Corporation*, 165 F.2d 777 (3rd Cir. 1947)	5
Gardner v. *National Bulk Carriers, Inc.*, 221 F.S. 243 (E.D. Va. 1963)	5
Garrett v. *Moore-McCormack Company*, 317 U.S. 239, 63 S.Ct. 246	6
Grantham v. *Fishing Boat Redwing*, 234 F.S. 89 (E.D. South Carolina 1964)	5
Heuschen v. *Flour Ocean Services, Inc.*, 483 F.2d 1396, 1974 AMC 1773 (5th Cir. 1973)	5
Igneri v. *Cie de Transports Oceaniques*, 323 F.2d 257 (2nd Cir. 1963), cert. denied, 376 U.S. 949 (1964)	5

	Page
International Stevedoring Co. v. *Haverty*, 272 U.S. 50, 47 S.Ct. 19 (1926)	6
Ivy v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978), *aff'd on rehearing*, 606 F.2d 524 (5th Cir. 1979) (en banc)	5, 6
Jamison v. *Encarnacion*, 281 U.S. 635, 50 S.Ct. 440 (1930)	6
Michigan Central Railroad Company v. *Vreeland*, 227 U.S. 59, 33 S.Ct. 192 (1913)	4, 7
Mobil Oil Corp. v. *Higgenbotham*, 436 U.S. 618 (1978)	6
Mpliris v. *Hellenic Lines, Limited*, 323 F.S. 865 (SD Texas 1969), aff'd per curiam 440 F.2d 1163 (5th Cir. 1971)	5
O'Donnell v. *Great Lakes Dredge & Dock Company*, 318 U.S. 36, 63 S.Ct. 488 (1943)	6
Petition of Gulf Oil Corporation, 221 F.S. 1000 (R.I. 1963)	5
Petition of United States Steel Corporation, 436 F.2d 1256 (6th Cir. 1970)	5
Sea-land Services, Inc. v. *Gaudet*, 414 U.S. 573 (1974)	6
Smith v. *Clark Sherwood Oil Field Contractors*, 457 F.2d 1339 (5th Cir. 1972)	5
United States v. *Smith*, 220 F.2d 548 (5th Cir. 1955)	5
Uravic v. *F. Jarka Co.*, 282 U.S. 234, 51 S.Ct. 111 (1930)	6
Wade v. *Rogala*, 270 F.2d 280, (3rd Cir. 1959)	5
Warner v. *Goltra*, 293 U.S. 155, 55 S.Ct. 46 (1935)	6
Whitaker v. *Blidberg Rothchild Company, Inc.*, 296 F.2d 554 (4th Cir. 1961)	5

Statutes

	Page
45 U.S.C. Sec. 51	4
46 U.S.C. Sec. 688	4

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1482

NUNO J. DoCARMO, Administrator of
the Estate of Nuno J. DoCarmo, Jr.
PETITIONER,

v.

PILGRIM I CORP.,
RESPONDENT.

BRIEF OF RESPONDENT, PILGRIM I CORP., IN OPPOSITION TO PETITION FOR CERTIORARI

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court review a decision of the First Circuit Court of Appeals affirming a District Court verdict and judgment for the defendant which conformed with clearly established decisional precedents limiting recovery to pecuniary damages in a death action brought under the Jones Act.

COUNTER-STATEMENT OF THE FACTS

The plaintiff's decedent died while employed as a crewmember on the defendant's vessel. The death occurred more than a marine league from shore. Of the various counts in Plaintiff's third amended complaint only the Jones Act count is at issue herein. The verdict of the jury was that the plaintiffs had sustained no damages as a result of the causative negligence of the defendant. The trial court ruled that the plaintiffs would be allowed to recover for any pecuniary loss, including loss of services, but not for emotional non-pecuniary loss.[1]

As a result of the plaintiffs' evidence certain questions of credibility were presented to the jury regarding the claim of pecuniary damages. Plaintiff's evidence was that the decedent was 21 years old, that he had lived with his parents and allegedly paid them some $75.00 per week for his room, board and laundry, that in 1973 he had worked at a gas station financed by his father and his net income from that work was $89.82 per week (out of which he allegedly paid $75.00 per week for the board, room and laundry), that during the four or five months prior to his death in June 1974, the decedent had been unemployed and had no income except for seven weeks of unemployment compensation in the amount of $68.00 per week, that during one of those months (April 1974) the decedent had been incarcerated in the House of Correction, and finally that from the money the decedent earned he

[1]The ruling of the Court admitted testimony by the parents of decedent as to his good character, helpfulness, consideration of others and participation in family activities as well as testimony by the decedent's brother of the decedent's encouragement in sports, school and work.

paid the cost of his own clothing, entertainment, car and vacations. It was further established that at the time of his death decedent had completed only one fishing trip as an apprentice for which trip he received a nominal sum. Plaintiffs nonetheless testified that at all times, including the period decedent was unemployed, he had lived at home and contributed $75.00 a week to the household for his room and board. A police officer testified for purposes of impeachment that in November 1973 he had inquired as to decedent's whereabouts and the decedent's father had told him that he had not seen his son for some time, that decedent was not living at home, and that he believed decedent was somewhere in Florida.

The Court instructed the jury that in its consideration of damages it could consider any material contribution which decedent made to his parents, be that contribution in the direct form of monies or in the indirect form of services, and that it could also consider financial benefits which decedent received from his parents. Apart from this instruction, no instruction was given specifically or impliedly stating that the parents were required to establish their monetary dependency to recover damages. Plaintiff took no exception to the jury instructions except with respect to the failure to charge that emotional non-pecuniary damages were recoverable; the Court did instruct, with no exception taken, concerning the right to recover for pecuniary losses including the value of all services. The jury found that the plaintiffs had not sustained damages, either in monetary loss or any loss of services.

The plaintiffs appealed to the First Circuit Court of Appeals on the issue of the measure of damages under the Jones Act and certain subsidiary issues. The First Circuit Court of

Appeals affirmed the District Court rulings in accordance with the case law which, since the enactment of the Jones Act, has consistently held that damages for emotional loss are not recoverable in a death action brought under the Jones Act.

REASONS FOR DENIAL OF THE WRIT

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE MEASURE OF DAMAGES WHICH CONGRESS PROVIDED IN A JONES ACT DEATH ACTION.

THERE IS NO IMPORTANT FEDERAL QUESTION SINCE CONGRESS HAS FOR SOME SIXTY YEARS INDICATED NO LEGISLATIVE CONCERN WITH THE ESTABLISHED JUDICIAL DECISIONS.

The issue in the case was one of fact, decided by a jury verdict. Well-established precedents of the Supreme Court were applied both by the District Court and the Court of Appeals.

In 1920, Congress enacted the Jones Act, 46 U.S.C. Sec. 688, which created a cause of action which could be brought by certain relatives of a seaman whose death was caused by the negligence of his employer. In the statute creating this cause of action Congress provided that it should be commensurate with the rights of railway workers under the Federal Employer's Liability Act, 45 U.S.C. Sec. 51 (FELA). That cause of action for railway workers had been enacted by Congress 12 years before the Jones Act was passed. Seven years prior to enactment of the Jones Act, and five years after FELA became law, this Court had ruled that survivors' recovery under FELA was limited to pecuniary damages. *Michigan Central Railroad Company* v. *Vreeland*, 227 U.S. 59, 33 S.Ct. 192 (1913). Since the Jones Act enactment in 1920 the Courts have consistently held that when Congress incorporated into the Jones Act the rights of plaintiffs under FELA, Congress intended to and did also incorporate the pre-existing qualification of those rights. Since 1920 the Courts have held that the Jones Act limits damages in a death action to pecuniary damages; Congress has not acted to change this rule.

There is no conflict amont the circuits on this issue. *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978), aff'd on rehearing, 606 F.2d 524 (5th Cir. 1979) (en banc). *Hueschen* v. *Fluor Ocean Services, Inc.*, 483 F.2d 1396, 1974 AMC 1773 (5th Cir. 1973). *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970). *Cities Service Oil Company* v. *Launey*, 403 F.2d 537 (5th Cir. 1968). *Smith* v. *Clark Sherwood Oil Field Contractors*, 457 F.2d 1339 (5th Cir. 1972). *Dixon* v. *Serodino, Inc.*, 331 F.2d 668 (6th Cir. 1964). *Whitaker* v. *Blidberg Rothchild Company, Inc.*, 296 F.2d 554 (4th Cir. 1961). *Wade* v. *Rogala*, 270 F.2d 280, (3rd Cir. 1959). *United States* v. *Smith*, 220 F.2d 548 (5th Cir. 1955). *Ballard* v. *Forbes*, 208 F.2d 883 (1st Cir. 1954). *Cleveland Tankers* v. *Tierney*, 169 F.2d 622 (6th Cir. 1948). *Dow* v. *Carnegie-Illinois Steel Corporation*, 165 F.2d 777 (3rd Cir. 1947). *Igneri* v. *Cie de Transports Oceaniques*, 323 F.2d 257 (2nd Cir. 1963), cert. denied, 376 U.S. 949 (1964).

Nor is there conflict among the district courts on this issue. *Mpliris* v. *Hellenic Lines, Limited*, 323 F.S. 865 (SD Texas 1969), aff'd per curiam 440 F.2d 1163 (5th Cir. 1971). *Gardner* v. *National Bulk Carriers, Inc.*, 221 F.S. 243 (E.D. Va. 1963). *Grantham* v. *Fishing Boat Redwing*, 234 F.S. 89 (E.D. South Carolina 1964). *Petition of Gulf Oil Corporation*, 221 F.S. 1000 (R.I. 1963).

The occasions which the Petitioner has pointed to as illustrating a liberal interpretation of the Jones Act do not justify the result which Petitioner herein seeks. Those cases involved principles or facts not native to FELA and its pre-existing FELA case law and therefore not incorporated into

the Jones Act with FELA. For example, *International Stevedoring Co.*, v. *Haverty*, 272 U.S. 50, 47 S.Ct. 19 (1926) and *Warner* v. *Goltra*, 293 U.S. 155, 55 S.Ct. 46 (1935) and *Uravic* v. *F. Jarka Co.*, 282 U.S. 234, 51 S.Ct. 111 (1930) went to the issue of who is a seaman. None of the cases cited by Petitioner purport to contradict a clear rule of FELA and many of the cases expressly affirm that FELA principles are incorporated in the Jones Act and are to be regarded as statutory directives. *Cox* v. *Roth*, 348 U.S. 207, 75 S.Ct. 242 (1954); *Uravic* v. *Jarka Co.*, 282 U.S. 234, 51 S.CT. 111 (1930); *Jamison* v. *Encarnacion*, 281 U.S. 635, 50 S.Ct. 440 (1930); *Garrett* v. *Moore-McCormack Company*, 317 U.S. 239, 63 S.Ct. 246; *O'Donnell* v. *Great Lakes Dredge & Dock Company*, 318 U.S. 36, 63 S.Ct. 488 (1943). Those cases which Petitioner cites for the liberality of the Jones Act do not contort that liberality into a denial of these directly applicable principles of FELA which Congress incorporated into the statutory scheme.

This court has consistently recognized that while the Jones Act may be a remedial statute, it is a statute. The remedies it gives are prescribed by Congress and Congress, both in 1920 and by its continued silence since then, has declared that only pecuniary damages are available in a Jones Act death action. There is no occasion for this Honorable Court to rewrite the will of Congress and disavow 60 years of judicial respect for that will.

The Fifth and First Circuits, the only two circuits to consider the definition of damages in a death action brought under the Jones Act since the decisions of this Court in *Sea-land Services, Inc.* vs. *Gaudet*, 414 U.S. 573 (1974) and *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), have both concurred that the statutory construction which Congress has left unchanged since 1920 remains valid and proper. *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978) aff'd

on rehearing, 606 F.2d 524 (5th Cir. 1979) (en banc); *DoCarmo* v. *Pilgrim I Corp.*, 612 F.2d 11 (1st Cir. 1980).

Both circuits uniformly rejected the radical possibility urged by the Petitioner that the measure of damages which was uniquely adopted in *Gaudet* for the General Maritime Law remedy of *Moragne* should be applied to the statutory remedy of the Jones Act. Those Circuits plainly affirmed that an exception cannot become the rule and that a desire for uniformity cannot be used to counter an established statutory rule of law in which the Courts and Congress have for so long concurred.[2]

The consensus among the courts is not untoward. The rights of claimants under the Jones Act were created by and defined by statute. Since 1920 it has been held that when Congress incorporated into the Jones Act the rights of railway workers under FELA, Congress also incorporated the limiting construction of those rights which had been declared by this Court seven years previously in *Michigan Central Railroad Company v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192 (1913). In the 60

[2]The measure of damages permitted in a Jones Act death action is uniform with the available damages under DOSHA. The state wrongful death statutes are not uniform in the measure of damages allowed. Any attempt to vary a Federal statutory remedy to accord with state remedies would result in a continuous chase after a standard subject to alteration by any of 50 state legislatures. Moreover, any contention that uniformity demands equal damages under the Jones Act and any given state statute is further contradicted by the different standards for liability imposed by the state statutes and the Jones Act. For example, the Massachusetts statute to which Petitioner has referred requires a finding that the defendant's acts were "willful, wanton or reckless" for most actions. Arguably if the measure of damages for the Jones Act were to be changed to accord with the local state standard then the liability out of which those damages arose should also be reduced to accord with the state provisions. This would result in the federal statute being preempted by the individual state statutes. Clearly this would not only do violence to uniformity but was not the intent of Congress in passing the Jones Act.

years since the Jones Act was passed, Congress has failed to change in any respect whatsoever that restriction on the extent of recoverable damages. As the First Circuit Court of Appeals correctly noted in its opinion, ". . . arguments concerning any injustice alleged to be perpetrated by this rule should properly be addressed to Congress." (612 F.2d 11 at 13). The Petitioner's complaints as to the wisdom of the existing statute are not properly addressed to this Court.

CONCLUSION

There being no controversy among the Courts as to the measure of damages which Congress provided in the Jones Act and there being no Congressional declaration to the contrary, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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